UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 432240
Issued to: William TINGLEY

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2174

William TINGLEY

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 7 December 1977, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, after hearing at Anchorage, Alaska, on 8,9, and 10 November 1976, 16 and 17 February and 8 February and 8 September 1977, suspended Appellant's license for a period for a period of three months upon finding him guilty of negligence. The two specifications of negligence found proved allege: (1) that Appellant, while serving as pilot aboard SS PORTLAND, under authority of the captioned document, did on 20 October 1976 wrongfully fail to navigate the vessel prudently, causing an a
llision between SS PORTLAND and the north end of the Anchorage City Dock; and (2) that Appellant, while serving as aforesaid, did on 20 October 1976 wrongfully fail to ascertain the correct state of the correct state of the tide, causing an allision between SS PORTLAND and the north end of the Anchorage City Dock.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced into evidence the testimony of nine witnesses, eleven documents, and thirteen photographs.

In defense, Appellant introduced into evidence the testimony of four witnesses and fifteen exhibits. Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specifications as alleged had been proved. He then entered an order of suspension for a period of three months.

The decision was served on 19 December 1977. Appeal was timely filed on 11 January 1978 and perfected on 13 November 1978.

FINDINGS OF FACT

I adopt the extensive findings of fact made by the Administrative Law Judge. In summary, I find as follows.

Appellant was serving on 20 October 1976, under authority of his duly issued Coast Guard license and endorsements thereon, as pilot aboard SS PORTLAND, an enrolled and licensed vessel engaged in the coasting trade, not sailing under register, and, at all times material to this appeal, not sailing upon the high seas. At all times material Appellant was conning the vessel. Weather and sea conditions were good. PORTLAND was approaching the port of the City of Anchorage, Alaska, in the early morning hours of 20 October 1976. Appellant, mistakenly believing it to be 19, rather than 20, October, miscalculated that the tide would be ebbing as he approached the dock. As a result of this error and Appellant's failure thereafter to take action sufficient to correct it, PORTLAND approached the dock at too fast a velocity to permit a safe landing. Upon realizing this, Appellant aborted his approach. In doing so, Appellant was forced to maneuver to avoid striking the tug KNIK WIND, moored properly at a berth above that assigned to PORTLAND. During this maneuvering, PORTLAND struck the dock and a large crane thereon. Eventually, with the help of KNIK WIND, PORTLAND moored. Subsequently, while being questioned by a police officer employed by the Port of Anchorage, who had begun to conduct an investigation separate from that of the Coast Guard, Appellant admitted that he had calculated the state of the tide for a landing on the nineteenth of October, and not the twentieth.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that: (1) Appellant was denied his constitutional right to administrative due process and that the specifications as charged do not conform to the requirements of 46 CFR 5.05-17 and do not meet their purpose of apprising Appellant of offenses of which he is charged so as to have enabled him adequately to have prepared his defense; (2) it was never established that Appellant was conning the vessel at all the relevant times as charged; (3) Appellant was denied his Sixth Amendment right to compulsory processes as provided by 18 U.S.C. 6004 in that a critical defense witness was denied immunity, and testimony absolutely fundamental to Appellant's defense was denied; (4) an admission made by Appellant during or in the course of a Coast Guard investigation was improperly admitted as evidence and considered by the Administrative Law Judge in violation of 46 CFR 5.20-120(a); (5) the Administrative Law Judge's finding of

negligence was not supported by substantial evidence of a reliable and probative character as required by 46 CFR 5.20-95(b); (6) a lack of impartiality by the Administrative Law Judge denied Appellant a fair and impartial hearing; and (7) jurisdiction to suspend all licenses and endorsements issued to Appellant by the United States Coast Guard does not exist.

APPEARANCE: Bradbury & Bliss, Inc., Anchorage, Alaska, by Francis Floyd.

OPINION

I

Appellant's first contention is meritless. Concededly, the specifications might have included additional facts; nevertheless, each sufficiently did provide Appellant with adequate notice of the acts or omissions forming the basis for the charge of negligence. Moreover, review of the more than 1,000 pages of transcript reveals clearly that Appellant knew what was at issue and that he was permitted ample opportunity to respond thereto. Cf., Decision on Appeal NO. 2152 (adequate notice and opportunity to respond held to not have been provided). Appellant cites Decisions on Appeal Nos. 2057 and 2087 in support of his argument. Both are inapposite. The holding in each was that a charge of negligence is not supported properly by a specification alleging violation of Rule 29, Inland Rules of the Road, because Rule 29 creates no affirmative duty. The specifications at issue here allege actions or omissions which, if proved, do constitute negligence. See, 46 CFR 5.05-20(a)(2).

II

Appellant's second contention is equally meritless. Appellant argues that "[i]t is possible that appellant was conning the vessel and relaying his orders directly to the chief mate. It is also possible that master was conning the vessel and relaying his orders to the appellant who further relayed the orders to the chief mate. It is also possible that the appellant was conning the vessel prior to the critical time relevant in the charges and that the master countermanded the orders of the Appellant and took control of the vessel at the critical times relevant to the charge. All of the above circumstances are possibilities, but none was ever established by substantial evidence during the proceeding as required by 46 CFR 5.20-95(b)." To the contrary, the record contains substantial evidence of a reliable and probative character which supports the finding of the Administrative Law Judge that Appellant was conning the vessel at all times material to the charge. For example, in response to questions as to who was conning the vessel into Anchorage, and who was giving rudder and

engine orders, the Chief Mate responded, "[t]he pilot." R.546. In these circumstances, the "possibilities" advanced by Appellant's arguments remain just that, "possibilities." A mere possibility is not sufficient to overcome findings of fact supported by substantial, credible evidence.

III

Appellant contends that he was denied his Sixth Amendment right to compulsory process for the defense. In a letter dated 9 June 1977, the Chief Counsel of the Coast Guard, responding for the Commandant, denied Appellant's request for a grant of immunity for the Master. The body of the letter provides as follows:

> "1. Reference (a) [CCGD17(dl) ltr 5904 dtd 21 April 1977] requested that this office seek a grant of immunity from prosecution, pursuant to reference (b) [18 U.S.C. 6001, et seq.], from the Attorney General for the subject named man. The request was predicated upon Captain Wilson's invocation of his Fifth Amendment constitutional right and refusal to testify when called as a witness for the respondent in an R.S. 4450 proceeding against the License and Document of William Tingley. The request for the grant of immunity was not initiated by the Coast Guard Investigating Officer but rather was made by the respondent at the urging of the Administrative Law Judge presiding in the matter.
>
> "2. Litigation involving requests for grants of immunity have arisen primarily in criminal prosecutions; however, the principles established therein are applicable to the administrative hearing process. It is well established that neither the courts nor defense counsel have a legal or constitutional right to use a statute, such as reference (b), or to force the government to use such a statute, to compel testimony of a defense witness. Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966),cert. denied, 388 U.S. 921 (1967); Morrison v. United States, 365 F. 2d 521 (D.C. Cir. 1967); United States v. Jenkins, 470 F.2d 1061 (9th Cir. 1972); cert. denied, 411 U.S. 920 (1973); Cerda v. United States, 488 F.2d 720 (9th Cir. 1973); United States v. Berrigan, 482 F.2d

171 (3rd Cir. 1973); United States v. Ramsey, 503 F. 2d 524 (7th Cir. 1974); In re Kilgo, 484 F. 2d 1215 (4th Cir. 1973); United States v. Allstate Morgage Corporation, 507 F.2d 492 (7th Cir. 1974); United States v. Bautista, 509 F.2d 675 (9th Cir. 1975); United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976). The determination that compulsion of the witness's testimony is in the public interest can only be made by the prosecutorial authority as only he knows what other

investigations and/or prosecutions are contemplated which could be seriously jeopardized. Since the prosecuting authority will most likely not know the specifics of the compelled testimony, he would be forced into "buying a pig in a poke" if he respondent and/or the court could utilize the immunity provisions of reference (b). The defendant's Sixth Amendment right to compulsory process must yield to the witness's Fifth Amendment privilege against self incrimination (Earl, supra.) and to the executive branch's authority to decide whether to prosecute the case [Alessio, supra; United States v. Nixon, 418 U.S. 683 (1974)].

"3. In the present proceedings, I have determined that it is not in the public interest to compel the testimony of Robert A. Wilson, particularly in light of the fact that there are other witnesses that can testify as to the events that transpired on the bridge and as to the conversations between the witness and the respondent on the date in question. Accordingly, the request to seek a grant of immunity for Robert A. Wilson from the Attorney General is denied."

I discern no legal or equitable basis for finding the denial of Appellant's request to have been improper. There were others who could have, and did, testify as to the events which took place on the bridge of PORTLAND. Even if it were accepted that none but the Master could testify to all of the events which occurred, Appellant's position would be no better. The right of the Coast Guard to decide whether to seek a grant of immunity, and the right of the Master to refuse to provide potentially self-incriminating testimony in the absence of that grant of immunity, outweigh the right of Appellant to compulsory process.

IV

Appellant contends that an admittedly damaging admission which he made to an Anchorage Port Policeman, who was in no fashion involved in the Coast Guard investigation, should not have been admitted at his suspension and revocation hearing. In support of his argument he cites 46 CFR 5.20-120(a) which provides, "no person shall be permitted to testify with respect to admissions made by the person charged during or in the course of the Coast Guard investigation except for the purpose of impeachment." Appellant's argument is that his admission was made "during" although not "in the course of" the Coast Guard investigation and should therefore not have been admitted. There is no explanation of the meaning of the term, "during or in the course of," within the regulatory history. See, 26 F.R. 5881 (1961); 27 F.R. 9859 (1962). Nevertheless, the purpose served by this regulation is clear. Under R.S. 4450, as amended, and 46 CFR Part 4, the Coast Guard undertakes investigations of marine casualties and accidents "for the purpose of taking appropriate measures for promoting safety of life and property at sea," 46 CFR 4.07-1(b). Investigations also are undertaken pursuant to 46 CFR 5.05-1 for the purposes set forth therein. To promote the cooperation who are best able to contribute to the investigation, including those who might be charged pursuant to 46 CFR 5.01-30, the Coast Guard precludes the admission into evidence at a suspension and revocation hearing of "admissions" by the party so charged when such admissions are made "during or in the course of the Coast Guard investigation." In this fashion, as a public policy, the Coast Guard has somewhat subordinated the proving of charges at a suspension and revocation proceeding to the more important goal of promoting marine safety. There is, however, no policy reason for precluding the admission of an "admission" made to someone not involved in the Coast Guard investigation. Hence, the word "or" in the term "during or in the course of the Coast Guard investigation" is not used in the disjunctive sense; rather, it simply serves to connect two virtually identical concepts, either of which might be deleted without effect. CF.,Decision on Appeal No. 2026 (admissions made to Customs agent actively assisting in Coast Guard investigation held to have been made "during or in the course of a Coast Guard investigation.") For these reasons, Appellant's argument is rejected.

V

Appellant argues in the alternative either that no presumption

of negligence was created by the allision with the dock, or that if one properly was created, his evidence of the absence of negligence sufficiently rebutted it.

Allision with a stationary object, in this case the Port of Anchorage dock, creates a rebuttable presumption of negligence. Decisions on Appeal Nos. 461, 672, 699, 1131, 1197, 1200. A rebuttable presumption is sufficient to establish a prima facie case so long as there is no substantial evidence to the contrary. Although the burden of proof does not shift, the effect of this prima facie proof is to put the burden on Appellant of going forward with the evidence. It was Appellant's burden to submit substantial evidence to prove that the allusion was not the result of his negligent action. Appellant did attempt to do this during his case in chief[1]. However, it is clear that the Administrative Law Judge did not give sufficient weight to Appellant's evidence of his freedom of negligence to rebut the presumption. While it may be argued that the Administrative Law Judge should have given greater weight to Appellant's evidence, it is not apparent that the Administrative Law Judge acted arbitrarily or capriciously in not doing so. Absent substantial credible evidence to the contrary, the Administrative Law Judge properly was entitled to rely upon the previously created presumption of negligence in finding Appellant guilty. See, generally, Decision on Appeal No. 477; Rule 301, Federal Rules of Evidence for United States Courts and Magistrates (1975); J. WIGMORE, EVIDENCE SS2487, 2490, 2491 (3rd Ed. 1940).

Appellant cites Decision on Appeal No. 2075 for the

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[1]Appellant argues that "[i]f a person charged with negligence can be found guilty merely on a presumption then that same person's right to remain silent is meaningless because he is forced to either respond or be presumed and found guilty." This argument misses the mark by a wide margin. Appellant was able to present a substantial, but insufficient, defense without finding it necessary to testify himself. Presumably, in weighing the advantages and disadvantages of testifying (and thus subjecting himself to cross-examination under oath), Appellant determined the latter to outweigh the former. To argue that he use of a validly created presumption improperly deprives one of his right to remain silent is to seek to use that right as "swords," rather than as a "shield." The right to remain silent in these administrative proceedings is intended to protect a party from being compelled to give any testimony. It is not, however, intended as a means of permitting a party to fustrate the legitimate ends of the Government in presenting proof of negligence at a hearing, the purpose of which is "to promote safety of life and property." 46 CFR 5.01-15.

proposition that a presumption will not suffice to prove a charge of negligence. However, Decision No. 2075 is inapposite. This decision held that, "in an R.S. hearing, evidence indicating only the occurrence of a discharge [of oil] is insufficient to create a presumption of negligence." (Emphasis added). In Appellant's case, as already discussed, presumption of negligence properly was created and ultimately relied upon.

The Administrative Law Judge properly could have relied solely upon the unrebutted presumption of negligence in finding the first specification proved.

However, he additionally found the specification proved by evidence other than this presumption of negligence. Appellant, in essence, argues at length that this evidence is not substantial, and probative. Suffice it to say that I am satisfied that the record amply supports the findings of the Administrative Law Judge. While, concededly, many of his findings could have been resolved in Appellant's favor, on this record I am unable to conclude that the Administrative Law Judge acted in an arbitrary or capricious fashion in making the findings which he did. Hence, they must stand.

Appellant argues that "[t] he Administrative Law Judge in his decision does not even discuss or make a finding with respect to proximate cause but merely finds appellant's actions to have 'contributed' to the allusion. (D.11) Thus, not only was there no evidence of proximate cause there also was no explicit finding of proximate cause and without such a finding the charge of negligence cannot be sustained." Negligence, for the purpose of suspension and revocation proceedings, is defined as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." 46 CFR 5.05-20(a)(2). In contrast to the civil cause of action which requires proof of actual loss or damage resulting from the allegedly negligent conduct [W. PROSSER, THE LAW OF TORTS, S30 (4th Ed. 1971)], a charge of negligence in a suspension and revocation proceeding requires proof only that the conduct in question failed to satisfy the standard, without regard to adverse consequences, if any.

Appellant asserts that he "was not allowed a fair and impartial hearing by the Administrative Law Judge." Review of the record reveals that in several instances, while the legal argument was"hot and heavy," Appellant's attorney and the Administrative Law Judge addressed each other in a somewhat less than cordial fashion. (It might be added that on several occasions the same occurred between the Investigating Officer and the Administrative Law Judge.) Yet, there is no indication whatsoever of personal bias on the part of the Administrative Law Judge. In fact, it appears that the Administrative Law Judge displayed admirable forbearance in judiciously conducting this long, and, at times, trying hearing. Appellant's argument is, therefore, rejected.

VII

Appellant argues that "[e] ach license or endorsement should be considered legally separate and distinct even though they are actually considered one physical document. Appellant was only acting under the authority of his pilots [sic] endorsement and thus all other licenses or endorsements of Appellant were not subject to the court's [sic] jurisdiction. See Soriano v. U.S.A., 494 F.2d 681 (9th Cir. 1974)." I previously have rejected this argument (Decision on Appeal No. 2091). Soriano requires no different result. In Soriano, the Ninth Circuit held that the Coast Guard has no jurisdiction over the Federal license of a pilot serving solely under his state license. Here, there is no state license involved. Appellant was serving as a Federal pilot of an enrolled and licensed vessel, engaged in the coasting trade and not sailing under register, and not on the high seas. Hence, jurisdiction over Appellant's Federal license and endorsements thereon exists under R.S. 4401 (46 U.S.C. 364) and R.S. 4450 (46 U.S.C. 239).

VIII

One final matter, not raised by Appellant, should be addressed. Appellant's request for a grant of immunity for the Master of PORTLAND was forwarded to the Commandant via the Commander, Seventeenth Coast Guard District, who favorably endorsed the request.The Commander of the Seventeenth District was Rear Admiral John B. Hayes, who in the interim, has become Commandant of the Coast Guard, and, therefore, the "Agency" under the Administrative Procedure Act, 5 U.S.C. 551 et seq. Nevertheless, Admiral Hayes would not be disqualified from making the final agency decision on appeal, were he personally to do so. The rule in these circumstances is that the Commandant would be disqualified only if he had, as a result of his previous involvement with the case, formed a judgement or opinion as to the ultimate controverted issues. Kennecott Copper Corp. v. Federal Trade Commission, 467 F.2d 67 (10th Cir. 1972), cert. denied, 416 U.S. 909 ((1974), reh.

denied, 416 U.S. 963 (1974); Safeway Stores, Inc. v. Federal Trade Commission, 366 F2d 795 (9th Cir. 1966). The Commandant's previous involvement was solely of an official and perfunctory nature, and concerned only the issue of a grant of immunity for the Master, on which issue he, as District Commander, favorably endorsed the position of Appellant. Inasmuch as I properly have been delegated the authority to make the final determination in this appeal, 33 CFR 1.01-40, and I previously have not been involved in the case, this issue need not be addressed further.

CONCLUSION

Each specification of the charge of negligence is proved by substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge, dated at Seattle, Washington, on 7 December 1977, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 7th day of Jan. 1980.

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